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No. 88-1982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DOROTHY CAMER for herself and MiKi Camer;
KIRK CAMER; and PEPI CAMER

Petitioners,

v.

SEATTLE SCHOOL DISTRICT, No. 1, et al

Respondents.

AMICUS CURIAE SUPPORTING APPELLANTS' PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISIION I STATE OF WASHINGTON

James A. Douglas
1613 Smith Tower
Seattle, WA 98104

rt

QUESTIONS PRESENTED

Can state courts summarily dismiss an action without consideration of the federal constitutional issues, on the grounds that state law does not provide for a private action?

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MOTION TO FILE AN AMICUS CURIAE BRIEF SUPPORTING APPELLANTS' PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

The undersigned respectfully moves the Court to accept an amicus curiae brief in the referenced petition for certiorari pursuant to Rule 36.1 of the Court. This motion is required because by Rule 36.1 because Respondents have refused ton consent to the filing of this brief.

The referenced petition relates to actions of the Seattle Public Schools and its execution or failure to execute the education laws of Washington state, in particular the laws which were passed in 1977 in compliance with the decision of the Washington State Supreme Court decision of Seattle School Dist. v. State,586 P. 2d 71, 90 Wn 2d 476 (1978).

The author, Eben Carlson, is an attorney in the state of Washington and has practiced law in Seattle since 1963. He and his children are graduates of the Seattle Public Schools. He was active in the citizens' organization that lobbied for the legislation which became the Basic Education Act of 1977, the enactment of which followed and was related to the litigation which culminated in the decision of Seattle School District v. State, 585 P. 2d 71, 90 Wn 2d 474(1978), cited herein. He has been actively

involved in non-partisan citizen organizations with special interest in the Seattle Public Schools, including their political desegregation, and was a member of the School District's Budget Advisory Committee for ten years, of which he was chair for two of those years. Of particular interest to him throughout this experience have been efforts to increase the effectiveness of parent and student participation in the educational processes and the accountability of teachers and administrators. In the educational process, litigation should be a resort only where no other effective remedy exists as, apparently, is the present case.

When he became aware of the referenced action in April 1989, the author felt that his experience behooved him to present the discussion in the amicus curiae brief in order to assist the

Court in its determination of the Petition.

He is joined in his support by the Seattle Chapter of the National Lawyers Guild. The National Lawyers Guild is an organization of over 7,000 lawyers, law students, and legal workers including judges and members of Congress. NLG has been working for social justice in the United States for over 50 years. Guild members have litigated throughout the South and also in the North to effectuate the promise of the Fourteenth Amendment in many fields, including access to education.

Respectfully submitted,

Eben Carlson
Smith, Brucker, Winn & Ehlert
1411 Fourth Avenue
Seattle, Washington 98101
(206) 624-8901

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AMICUS CURIAE SUPPORTING APPELLANTS' PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

This brief is filed pursuant to Rule 36.1 of the Rules of this Court on behalf of Eben Carlson, an attorney in the State of Washington. The Petition for Writ of Certiorari to the Washington State Court of Appeals, Division I, was docketed on

May 30, 1989 and this brief was filed with the time allowed for filing.

STATEMENT OF THE CASE

We adopt the Petitioners' Statement of the Case and assume, for the purposes of the argument, that it must be taken as admitted, from the state of the record, that none of the petitioning children received instruction in the state constitution, in a Washington state history course or otherwise, and the children did not receive, in the appropriate classes, elements of the mathematics and language arts curricula prescribed by the state statutes. Apparently, the Seattle Public School District has provided no explanation for the lacunae and has no procedures to effect the excissions.

REASON FOR GRANTING THE WRIT

When a school district fails to provide constitutionally required programs, the injured beneficiaries have Fourteenth Amendment protection which must be affirmed by this Court.

This amicus brief will not address the issue of res judicata but only the question of whether the Petitioners have stated a claim based on the Fourteenth Amendment to the U. S. Constitution and, concomitantly, 42 U.S.C. 1983.

The Washington Court of Appeals decision does not burden the record with an analysis of the constitutional issues raised by the Petitioners. After concluding that the relevant legislation providing for public education in the State demonstrated no intention to create a private action for a district's failure to comply with its requirements under the criteria of Cort v. Ash, 422 U.S. 66 (1975), the Court simply stated, at (Pet

A-7), that the Petitioners had not stated a cause of action under either the Washington State or the United States Constitutions. The Camers had not stated facts of the State's failure to provide amply for the education of children (under Washington State Const. Art. 9, section 1) and had not shown injury, citing only Seattle School Dist. v. State, 585 P 2d 71, 90 Wn2d 476 (1978). The Court did express (Pet A-6) the very legitimate concern that courts not become involved in determinations for which they are ill-equipped: "to oversee and monitor day-to-day operations of a school system." Though the Court assumed "that the Camers are within the class for whose special benefit the statute was enacted," political remedies were available generally and only such remedies were appropriate.

The Washington Court did not discuss the question of whether the federal Con-

stitution guarantees a public education for all children and, apparently, concluded that the Washington state constitutional provision requires only ample funding for public education. In fact, the constitutional provisions are related to each other and the implementing legislative scheme.

The importance of education to the exercise of responsible, autonomous citizenship has been uniformly recognized in the Supreme Court cases involving educational entitlement and the Fourteenth Amendment to the United States Constitution. In Brown v. Board of Education, 347 U.S. 483 (1954), the Court stated:

> Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditure for education both demonstrate our recognition of the importance of an education to our democratic society. It is required in the performance of our most basic public responsibilities, . . . it is the very foundation of good citizenship. In these days it is doubtful that any child may

> reasonably be expected to succeed in life if he is denied the opportunity of an education. Brown, at p. 493.

The Brown decision concluded the provision of separate, equivalent facilities for a racially segregated group violated the equal protection requirement of the Fourteenth Amendment. In Brown the Court did not discuss whether it was applying special scrutiny to the arrangement due to the existence of a fundamental federal right to education.

While again recognizing the importance of education, this Court in San Antonio School Dist. v. Rodriguez, 411 U.S. 1(1973), explicitly denied that the Supreme Court had decided the Fourteenth Amendment required a minimum of education for all children. The importance of education did not guarantee it a place among the fundamental rights safeguarded by the equal protection clause of the Fourteenth Amendment. That education is

useful to the exercise of free speech and the vote does not mean that individuals are guaranteed the most effective speech and vote. It had not been argued in Rodriguez, as the opinion stated, that discrepancies in the tax bases among districts had deprived any child of a minimum education. In such a case, the decision indicated the Court need not closely scrutinize the state funding scheme, but need only find that it bore some rational relation to the state's purpose of funding education. The dissent of Justice Brennan stated that the importance of education required strict scrutiny regardless of whether one found its implicit or explicit guarantee in the Constitution, quoting Wisconsin v. Yoder, 406 U.S. 205 (1972). As in all equal protection cases, one must consider the significance of the state interest and the

reasonableness of the means by which it seeks to advance such interest.

In Papasan v. Allain, 478 U.S. 265 (1986), the Court distinguished Rodriguez, which was quoted at p. 284 concerning the proposition that, although education may not be among the rights afforded explicit protection under the federal Constitution, this does not foreclose the possibility that "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either (the right to speak or the right to vote)." In this case, the Court found that the conversion of a source of revenue of a school district did not bear a rational relation to the legitimate state purpose of providing funding for public education.

The absence of a final determination of "whether a minimally adequate education is a fundamental right and whether a

statute alleged to discriminatorily infringe that right should be accorded heightened equal protection" (Papasan v. Allain, 478 U.S. 265, 285 (1986)) did not preclude invalidation of a distinction where the justifications for discrimination were "wholly insubstantial in light of the costs involved to these children (undocumented aliens), the State and the Nation," Plyler v. Doe, 457 U.S. 202, 230 (1982).

It is submitted that in the present case, regardless of the requisite level of scrutiny, the record contains no rational basis for the arbitrary denial of the required elements of the state mandated educational program to the Petitioners, nor is any state interest advanced for such denial.

With respect to the issue of due process, it is not necessary to determine whether a federal right to a certain

education exists. Typically, state law defines the rights or "entitlements" with respect to which its citizens must be afforded due process. Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 553 (1972); Goss v. Lopez, 419 U.S. 308 (1974). In fact, the Court of Appeals, (Pet A-7) states that the Washington "Const. art. 9, section 1, imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of children." (Citing Seattle School Dist. v. State, 585 P 2d 71 (1978), 90 Wn 2d 476.

The case cited addresses in detail the issues of what that Constitutional provision means and what remedies exist for its enforcement. It found that the remedies included judicial enforcement of the constitutional rights personal to school children and required the legislature to define education.

The Constitution, art. 9, sec. 1, imposes a paramount duty upon the State which in turn creates a correlative right on behalf of all resident children, (585 P 2d 71, at 90)

(This) duty goes beyond mere reading, writing and arithmetic . . . Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. See Wisconsin v. Yoder, 406 U.S. 205 (1972). (p. 94)

(T)he above mentioned educational concepts . . . constitute broad guidelines and . . . the effective teaching and opportunities for learning these essential skills make up the minimum of the education that is constitutionally required. (p. 95)

(The Legislature) has not yet fully implemented Constitution, art. 9, secs. 1 and 2 by defining or giving substantive content to "basic education" or a basic program of education. Thus the Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to them. (p. 95)

Clearly all respondent children fall within the zone of interest to be protected by the . . . constitutional classification. They, of all people, are the intended and immediate objects of RCW Title 28A and WAC Title 180. (p. 83)

Thus, according to the Washington Supreme Court, the Legislature is required by its Constitution to define education and the implementation of its guarantee in a manner the adequacy of which may be judicially challenged by the obvious objects or beneficiaries. The same Court considers the deprivation of a temporarily confined juvenile of that education to be a violation of the legislatively defined right. Tommy P. v. Board of County Comm. of Spokane, 97 Wn. 2d 385, 645 P 2d 697 (1982).

The Fourteenth Amendment due process protections of state-created and defined property was considered in Goss v. Lopez, 419 U.S. 565 (1974). There, state statutes provided for public education and mandatory attendance. Having extended such entitlements and created such expectations, the state could not withdraw them without due process. The extent of the

procedural requirements might depend upon the extent of the threatened deprivation, but procedures must be provided since, citing Brown, "education is perhaps the most important function of state and local governments." (at 556). Goss held that a school district could not suspend a student for less than ten days without a disciplinary hearing.

In the present case, petitioners have been denied elements of a "basic program of education" required by the state Constitution and defined by the state Legislature, as required of it by the interpretation of the state Supreme Court. This deprivation of property has occurred without process, without apparent relation to a legitimate interest of the state or the school district, and in apparent denial of the equal protection of the state's laws. Nor is this a question of whether courts should manage a school

district's operations, redefine its education program or adjudge the propriety of its legislatively defined program, but it is whether the arbitrary denial of state mandated and defined entitlements may be judicially determined and checked. From the state of the record in this case, it would seem clear that Petitioners are entitled at least to a declaration of the District's default. Nor is this a case, as in Cort v. Ash, of whether a statute may be construed as not creating a private action. 42 U.S.C. 1983 explicitly provides such an action for the constitutional violations of state officials.

This is further not a case of adjudicating the general adequacy of a district's educational effort nor the propriety of its chosen means. Donohue v. Compigne Free School Dist., 391 N.E. 2d 1352, 47 N.Y. 2d 440 (1979). The district

has failed to provide constitutionally required programs. Finally, it is not a case of de minimus defalcations, especially when compared, for example, with the several days suspensions involved in Goss which also involved the legitimate interest of discipline.

It is ironic that among the educational elements required by the legislature which have been denied Petitioners is instruction on the state Constitution, upon which they must rely in seeking their remedy.

CONCLUSION

The need to reverse the state decision and remand this case for hearing requires that a Writ of Certiorari be granted.

Respectfully submitted,

Eben Carlson
Smith, Brucker, Winn & Ehlert
1411 Fourth Avenue
Seattle, Washington 98101
(206) 624-8901